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May 24, 2018

Via E-mail and Fedex
Sharon E. Kivowitz, Esq.
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 2
290 Broadway, 17th Floor
New York, NY 10007

Re: Administrative Order for a Remedial Design Index No. CERCLA-02-2018-2015; New Cassel/Hicksville Contaminated Groundwater Superfund Site, OU1

Dear Ms. Kivowitz:

This firm represents 570 Properties, Inc. ("570 Properties"). We write in response to the letter of the United States Environmental Protection Agency ("USEPA") dated May 17, 2018, which set the effective date of the Unilateral Administrative Order ("UAO") for Remedial Design (initially issued by the USEPA on March 22, 2018) as May 21, 2018, and which directed the Respondents identified in the UAO to submit, by May 24, 2018, a notice of intent to comply with the UAO. Following a review of the UAO and the comments thereto, 570 Properties declines to comply with the UAO for the reasons set forth herein. Nothing in this letter, however, shall be construed to limit 570 Properties' rights, claims, and/or defenses that it may have against EPA or any Respondent or PRP now, or at any point in the future. Nor is this letter an admission of liability or responsibility.

The UAO at paragraph 50 requires 570 Properties to provide written notice setting forth any "sufficient cause" defenses, pursuant to CERCLA § 106(b) and 107(c)(3), for its intent not to comply with the UAO. Critically, however, EPA is not authorized to require a description of party's "sufficient cause" defenses, or to limit a party's sufficient cause defenses to the facts and circumstances that exist prior to the Effective Date of the UAO. Thus, 570 Properties objects to this requirement and expressly reserves its right to raise *any* defenses, including, but not limited to "sufficient cause" defenses, whether presently known to 570 Properties or not.

Moreover, CERCLA § 106(b) provides that where a party has "sufficient cause" to refuse to comply with a UAO, that party will not be subject to civil damages. *Emhart Indus. v. New England Container, Co., Inc.*, 274 F. Supp.3d 30 (D.R.I. 2017). A party has "sufficient cause" if they have an objectively reasonable basis for believing that the UAO was invalid or inapplicable to them. *General Elec. Co. v. Jackson*, 610 F.3d 119, 110 (D.C. Cir. 2010). As will be set forth herein, 570 Properties has "sufficient cause" for refusing to comply with the UAO.

As an initial matter, 570 Properties adopts and incorporates all of the "sufficient cause" defenses identified by IMC Eastern Corp. ("IMC") in its May 23, 2018 letter to USEPA, which defenses are based upon the comments that IMC transmitted to USEPA on April 25, 2018, and which comments 570 Properties adopted in its April 27, 2018 comments letter to USEPA. Specifically, 570 Properties identifies the following good-faith bases for its refusal to comply with the UAO.

I. USEPA's Remedial Design does not comply with the National Contingency Plan

As discussed at length in IMC's May 23, 2018 letter, USEPA has arbitrarily and capriciously failed to consider decades of critical data necessary to an appropriate categorization of the New Cassel/Hicksville Groundwater Contamination Superfund Site (hereinafter the "Site"). In refusing to consider the aforementioned data, USEPA has crafted an inaccurate Conceptual Site Model ("CSM") resulting in a fundamentally flawed and inaccurate Feasibility Study that is inconsistent with the National Contingency Plan ("NCP"). Further, USEPA did not conduct a Remedial Investigation ("RI") that was compliant with the goals of the NCP. Indeed, USEPA ignored the advice of its own consultant regarding significant gaps in USEPA's data that went to the heart of USEPA's ultimate conceptualization and characterization of groundwater conditions at the Site. Moreover, USEPA's RI refused to consider the contamination emanating upgradient to OUI (notably from the former Sylvania and General Instrument sites), which contamination has resulted in a plume that continues to migrate into OU1. Indeed, USEPA's own consultant's data confirmed that this upgradient plume was flowing into OU1.

Furthermore, it bears mentioning that USEPA's OU1 plume depictions in its RI and FS differ markedly: the RI more accurately depicts the size of the OU1 Eastern Plum and the RI properly incorporates groundwater data relevant to the upgradient plume flowing into OU1, and emanating from a number of upgradient sites in the New Cassel Industrial Area ("NCIA"), whereas the FS plume depiction does not. Additional examples of USEPA's arbitrary and capricious refusal to consider additional data are set forth in IMC's May 23, 2018 letter at 6-7. Again, and as noted in IMC's May 23, 2018 letter, all of the foregoing issues have been previously identified, but USEPA has failed to address same.

Thus, USEPA has arbitrarily and capriciously characterized site conditions, resulting in a flawed remedy that will be far too costly and that will not adequately address, and cannot effectively remediate, the actual groundwater conditions at OU1.

II. USEPA FAILED TO ADEQUATELY ADDRESS 570 PROPERTIES' COMMENTS REGARDING *DE MINIMIS SETTLEMENTS* AS REQUIRED BY CERCLA

CERCLA § 122(g)(1)(A) provides that USEPA shall as promptly as possible reach a final settlement with a potentially responsible party ("PRP") under CERCLA if such settlement involves only a minor portion of the response costs at the facility concerned and if the following conditions are met: (i) the amount of hazardous substances contributed *by that party* to the facility is minimal in comparison to other parties' contributions of hazardous substances; and (ii) the toxic or hazardous effects of the substance contributed *by that party* to the facility are minimal comparison to other hazardous substances at the facility. Moreover, pursuant to CERCLA § 122(a), USEPA is *required* to notify the PRPs in writing of its determination not to pursue *de minimis* settlements *and* the reasons why such settlements are inappropriate. USEPA has failed to do so, however.

Specifically, USEPA has not addressed why it has not pursued CERCLA § 122(g)(1)(A) with 570 Properties, Inc. or any PRP for that matter. Indeed, USEPA's May 17, 2018 letter is entirely devoid of any mention of § 122(g)(1)(A). To the extent that USEPA attempted to address 570 Properties' ongoing concerns regarding this failure via subsequent e-mail, USEPA's response amounted to a misreading of the requirements of § 122(g)(1)(A).

As USEPA is well aware, the hazardous substances complained of in the UAO were present at OU1 (and were, in fact, the subject of active remediation) well before 570 Properties acquired the real property located at 570 Main Street, Westbury, New York. *See* Sections 5.3-5.7 of the 2013 Record of Decision. Nevertheless, USEPA has failed to notify 570 Properties in writing why it elected not to pursue a § 122(g)(1)(A) *de minimis* settlement.

III. 570 PROPERTIES' LIABILITY IS DIVISIBLE

It is well-settled that CERCLA liability is not joint and several where the harm caused by a party is Liability under CERCLA is not joint and several where the harm caused by a party is divisible because the harm is distinct or there is a reasonable basis for apportionment. *See Burlington Northern and Sante Fe Ry. Co. v. United States,* 556 U.S. 559, 614-615 (2009).

Here, the NCIA Western Plume is rapidly attenuating and has not entered either OU1 or the Site, generally. Moreover, and as IMC has made clear to USEPA, the NCIA Western Plume even at its maximum extent was shallow and limited in special extent and has been aggressively remediated. Thus, 570 Properties' liability is divisible.

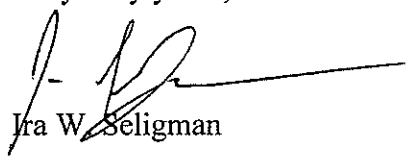
IV. 570 PROPERTIES CAN NOT MEET THE FINACIAL ASSURANCES REQUIRED BY THE UAO

As USEPA no doubt recognizes, it is obligated to assess whether a party has sufficient financial resources to comply with a UAO prior to issuing said UAO. 570 Properties lacks sufficient financial assets and has insufficient revenue to meet the financial assurance requirements set forth in the UAO, yet another "sufficient cause" to refuse to comply with the UAO.

Given the foregoing, 570 Properties respectfully asserts that it has "sufficient cause" to refuse to comply with the UAO.

Should you wish to discuss this matter further, do not hesitate to contact the undersigned.

Very truly yours,



Ira W. Seligman

cc: 570 Properties, Inc.